by such local authorities as the legislature shall name, the legislature cannot, by designating the class out of which the officers shall be chosen, interfere with the freedom of choice which it was clearly intended that the local electors should exercise.

One may well hesitate before dissenting absolutely from this opinion. But it should be observed that there is something to be said in favor of the opposite view. It will of course be granted that the legislature cannot appoint municipal officers. (See the leading case of *People* v. *Hurlbut*, 24 Mich. 44.) Nor can it, by arbitrarily limiting the field of candidates, attain practically the same result. It has been laid down, to be sure, in general terms, that the legislature can prescribe the qualifications of city, town, or village officers. (*State* v. *Von Baumbach*, 12 Wis. 310.) But this must be taken in a limited sense. While the legislature cannot, for example, forbid the election to a municipal office of a Republican negro as such (Tuck, J., in *Mayor of Baltimore* v. *State*, 15 Md. 376, 468), it would seem that it can prescribe the mental qualifications which the candidate must possess, as well as other qualities reasonably essential to fitness. (See, for instance, the statute under discussion in *People* v. *Warden of City Prison*, 144 N. Y. 529.) It is clearly a question of degree. The legislature can create a new municipal office, and it hardly seems beyond the scope of its power to establish such reasonable qualifications for candidates as shall be essential to the attainment of the end for which the office was created. In the case of the Albany Police Commissioners, may it not have been a reasonable requirement, considering the nature of the office, that the two leading political parties should be equally represented on the board? If so, it may fairly be argued that there is no such manifest conflict between the law in question and the constitutional provision for local self-government as to warrant holding the former a nullity.

It is on the other point, however, that O'Brien, J., in his concurring opinion, lays most stress, namely, that the law disqualifies for the office all who are not members of one of the two leading political parties, and is unconstitutional for that reason. This view finds support in the cases of *Attorney-General* v. *Board of Councilmen of the City of Detroit*, 58 Mich. 213, and *City of Evansville* v. *State*, 118 Ind. 426. Here too it may be urged that it is only a question of degree. The legislature might disqualify illiterate or dishonest persons from holding the office of mayor of a city on the ground that the nature of the office demanded it. May it not be said that in these days, when the proportion of citizens belonging to one of the two large political parties is so very great, it is reasonably necessary to leave other parties out of consideration in establishing a non-partisan board of only four officers?

RECENT CASES.

AGENCY — AUTHORITY COUPLED WITH AN INTEREST. — P. promoted a company for the purpose of purchasing from him and working a mining property. C. signed an underwriting letter addressed to P., by which he agreed, in consideration of a commission, to subscribe for a specified number of shares in the company, and by which he authorized P. to apply for the shares on behalf of C., and the company to allot them. He further agreed that this application should be irrevocable. P. by letter accepted these terms. Later C. wrote to P. and to the secretary of the company repudiating

the agreement. P., however, applied on behalf of C. for the shares, and the company alloted them, and placed him on the register. *Held*, that C. was not entitled to have his name removed from the register, inasmuch as the authority given to P., for sufficient consideration, was an authority coupled with an interest, and therefore not revocable. *In re Hannan's Empress Gold Mining & Development Co.*, [1896] 2 Ch. 643.

It is well settled that an authority coupled with an interest is irrevocable; but the courts have been unable to settle upon a comprehensive and precise definition of an interest. See Mechem on Agency, §§ 204–207, collecting authorities; Anson on Contracts, 263–265; Parsons on Contracts, 8th ed., *69; opinion of Marshall, C. J., in *Hunt* v. *Rousmanier*, 8 Wheat. 174. The decision in the principal case is clearly within the broad principle stated by Wilde, C. J., in *Smart* v. *Sanders*, 5 C. B. 917, to the effect that an authority coupled with an interest exists, and is irrevocable, "where an agreement is entered into on sufficient consideration, whereby an authority is given for the purpose of conferring some benefit on the donee of that authority." In the language of Lopes, L. J., "The object was to enable Mr. Phillips, the vendor, to obtain his purchase money, and it therefore conferred a benefit on the donee of the authority." But see Anson on Contracts, 264.

ATTORNEY AND CLIENT — ACTION FOR MONEY COLLECTED — STATUTE OF LIMITATIONS — TRUSTS. — An attorney collected money for his client by effecting the settlement of a suit. Two days later he informed the client, and promised to pay it over as soon as he had settled certain contingent fees. The client refused to ratify the settlement or to accept the money, and during the pendency of proceedings to have the settlement set aside the attorney continued to hold the money. Suit was brought to recover it, and the statute of limitations was set up as a bar. *Held*, that the relations between the attorney and the client did not constitute a technical and continuing trust alone cognizable in equity and exempt from the statute; and that the action was barred after the lapse of four years from the time the attorney gave notice of the collection. *Schofield* v. *Woolley*, 25 S. E. Rep. 769 (Ga.).

Constructive trusts are not exempt from the operation of the statute of limitations, as in the case of trusts cognizable alone in equity. See 2 Wood on Limitations, §§ 200, 215, and a recent case, *Railway Co.* v. *Stillwater*, 68 N. W. Rep. 836. It would seem that the court, in the principal case, rightly viewed this as at most a constructive trust, and correctly held that the attorney, as an agent liable at law, was entitled to set up the statute. See 1 Wood on Lim., § 18; Godefroi's Trustees, 309. Various views obtain, however, as to when the statute should begin to run. See 1 Wood on Lim., chap. X. It has been held in New York that where the attorney notifies the client of the collection, as in the principal case, the statute does not begin to run until the client has had a reasonable time in which to make demand. *Lyle* v. *Murray*, 4 Sandf. 590. On the other hand, it has been held in Pennsylvania, in agreement with the principal case, that under such circumstances the statute runs from the time of notice. *McDowell* v. *Potter*, 8 Pa. St. 189.

BILLS AND NOTES — DEMAND NOTE — WHEN CLAIM AGAINST INDORSER IS BARRED. — A demand note with interest payable annually was indorsed by the payee to the plaintiff on the day it was made. The plaintiff did not present it to the maker for payment until ten years after its date. Payment being refused, the plaintiff notified his indorser, and seeks to recover from him the amount of the note. *Held*, a demand note, whether with or without interest, does not mature as to an indorser until demand is actually made, but that demand must be within a reasonable time. *Leonard* v. *Olson*, 68 N. W. Rep. 677 (Iowa).

In England and in New York such a note as this is regarded as a continuing security which does not mature until payment is demanded. *Brooks* v. *Mitchell*, 9 M. & W. 15; *Merritt* v. *Todd*, 23 N. Y. 28. But the anomalous doctrine that a demand note is due immediately, without any demand, has furnished ground for argument that the indorsee who does not present such note for payment on the day he receives it loses his rights against the indorsers. The courts have not adopted this rule strictly, but have held, as in the principal case, that presentment within a reasonable time is sufficient. 2 Ames's Cases, on Bills and Notes, 291.

BILLS AND NOTES — FAILURE OF CONSIDERATION — SALES — RESCISSION. — *Held*, that a promissory note given for a pony, the title to the pony to remain in the vendor until payment of the note, and the vendee having the option to rescind the sale before the note is due, is void for failure of consideration, where the pony died before the option was exercised. *Lyon* v. *Stills*, 37 S. W. Rep. 280 (Tenn.).

This case stands or falls according to whether the risk of loss was on the vendee or vendor. The principal case is *contra* to the better view, that it was on the vendee, and

that the title remained in the vendor simply as security, a sort of chattel mortgage. *Chicago Railway Equipment Co.* v. *Merchants' Bank*, 136 U. S. 268. The privilege of option should not shift the liability of loss from vendee to vendor. Had the vendee agreed to take the pony if he liked it, instead of agreeing to give it up if he did not like it, the loss would have been on the vendor. *Carter* v. *Wallace*, 42 N. Y. 190; *Hunt* v. *Wyman*, 100 Mass. 198. The court, however, seem to have lost sight of this distinction, although the facts are somewhat meagrely reported.

CARRIERS — LIMITING LIABILITY — EXPRESS MESSENGERS. — *Held*, that a carrier can lawfully contract to be free from all liability for injuries that may negligently be done to an express messenger. *R. R. Co.* v. *Keefer*, 44 N. E. Rep. 796 (Ind).

As it is absolutely necessary that railroads, as public servants, should conduct their business with the utmost care, most courts do not allow them by contract with their passengers to do away with all liability for injury. The Indiana court holds that this restriction should not apply to contracts with express companies, since they have no common law right to demand carriage. *Express Cases*, 117 U. S. 1. These cases were treated as if expressmen only were concerned, and it was said that railroads had never held themselves out as carriers of express companies. The vital question, whether the public interest demanded that these companies should have a right to accommodation on trains, was not considered. But assuming that these decisions were not inconsistent with the carrier's duty to the public, though the weight of authority is *contra*, it would seem that, if carriers do agree to take expressmen, they should carry them on the same conditions that they carry others. This does not prevent a contract that the railroad should not be liable for injury caused by plaintiff's employment in the baggage car. See *Bates* v. *R. R. Co.*, 147 Mass. 215.

CARRIERS — NEGLIGENT DELAY — ACT OF GOD. — *Held*, that a carrier is responsible for the loss of goods which he negligently shipped late, although they were destroyed by act of God. *Wald* v. *Pittsburgh R. R.*, 44 N. E. Rep. 888 (Ill.).

In cases of deviation, where loss could not have been expected to result, the carrier is nevertheless liable; he has intermeddled with the goods. The doctrine that the same should be true of delay was applied in *Reed* v. *Spaulding*, 30 N. Y. 630; but it may well be argued that the rule should not apply to a mere nonfeasance. Moreover, the carrier was held liable for deviation because all insurance was thereby forfeited, a reason that does not exist where the carrier has been dilatory in shipping. This question however does not arise in the principal case, since the carrier was not delaying at the time of the accident. After transportation in due course has begun, he can only be liable on the doctrines of legal cause, and this loss was not the natural and probable consequence of the delay. The decisions in New York and Missouri are in *accord* with the principal case; those in Massachusetts, Pennsylvania, and the United States courts are *contra*.

CONFLICT OF LAWS — EXECUTION OF POWER — DOMICIL. — Property was settled on A for life, with power of appointment by will. The settlement was made in England, and all the parties to it had at the time English domicils. Later A acquired a French domicil, and executed a will, purporting to exercise the power of appointment. The will was valid according to English, but invalid according to French law. *Held*, the power was well exercised. *In the Goods of Huber*, [1896] P. 209.

It is the general rule that a will is good or bad, as to its formal requirements, according to the law of the testator's domicil at the time of his death. There would seem to be no sufficient reason why any exception to this rule should be made, when the will, instead of being a direct disposition of property, is the exercise of a power of appointment. Dicey's Conflict of Laws, 703. But in the latter case it is settled in England, if the property be personalty, that the will of the donee is a good exercise of the power, whether the will conform to the law of the donee's domicil, *D'Huart* v. *Harkness*, 34 Beav. 324; or to that of the donor, *In the Goods of Alexander*, 29 L. J. (P. & M.) 93. It was on the authority of the last named decision that the principal case was decided, the court recognizing that its holding was wrong on principle. In America precisely this question does not seem to have arisen. But two decisions in cases closely analogous appear to indicate that the United States courts disregard the law of the domicil of the donee entirely in determining whether a power of appointment has been duly exercised by will, looking only to the domicil of the donor. *Bingham's Appeal*, 64 Pa. St. 345; *Cotting* v. *De Sartiges*, 17 R. I 668. This involves a still greater departure from principle. Cf. *Sewall* v. *Wilmer*, 132 Mass. 131.

CONFLICT OF LAWS — VALIDITY OF CONTRACT. — A resident of Pennsylvania, on application made in that State to an agent of a New York building and loan association, became a member thereof, and obtained a loan from it, giving notes and bond therefor, secured by mortgages on Pennsylvania lands, all the instruments describing

the association as of Syracuse, N. Y., and declaring the notes payable at its office there. *Held*, that the contract was not governed by the usury laws of Pennsylvania. *Bennet* v. *Eastern Building & Loan Co.*, 35 Atl. Rep. 634 (Pa.).

There is much confusion among the authorities on this question. On principle, the decision seems wrong. The sovereign power in Pennsylvania has declared usurious contracts to be illegal. Such contracts, made in Pennsylvania, never acquire a legal existence. "They are not only void in that State, but void in every State, and everywhere." *Akers* v. *Demond*, 103 Mass. 323; *Scudder* v. *Union Bank*, 91 U. S. 406. 10 HARVARD LAW REVIEW, 170.

CONSTITUTIONAL LAW — BI-PARTISAN POLICE COMMISSION. — *Held*, that a statute providing for the election by a city council of four police commissioners, and requiring that two be chosen from each of the two leading political parties in the council, is unconstitutional. *Rathbone* v. *Wirth*, 45 N. E. Rep. 15 (N. Y.). See NOTES.

CONTRACTS — STATUTE OF FRAUDS. — The defendant made an offer in writing to agents of the plaintiff to buy a parcel of land, saying that, if his offer was accepted, he would sign a certain draft contract, the contents of which were known to him. The agents accepted the offer, and, inserting the vendor's name, sent the draft contract to the defendant. It was never signed, and on suit for specific performance by vendor, it was *held* that vendee could not plead the statute of frauds. *Filby* v. *Hounsell* [1896] 2 Ch. 737.

The defendant claimed that he had not signed anything which directly or sufficiently set forth who the vendor was. But the offer of the defendant contains the names of the contracting parties, and this is sufficient to satisfy the statute of frauds. Who the principals are may be proved by extrinsic evidence. *Morris* v. *Wilson*, 5 Jur. (N. S.) 168. If it may be looked on as settled that an agent may accept without disclosing his principal, it matters not that the defendant did not sign the draft contract, since it had been particularly referred to by him in his written offer which was accepted by the agent. *Morris* v. *Wilson, supra.*

CORPORATIONS — EXPULSION OF MEMBERS. — Relator, a member of a club incorporated for social purposes, being dissatisfied with the rejection of a candidate for membership, sent a circular to the other members, setting forth the rejection and urging the calling of a special meeting. Relator was notified to appear before the board of directors and give an explanation of his conduct. He appeared, was heard, and was expelled. *Held*, that a mandamus would issue to review the proceedings of the board of directors. *People* v. *Up-Town Assoc.*, 41 N. Y. Supp. 154.

In its opinion, the court concedes that the directors had power to annul relator's membership for conduct which might, in their judgment, endanger the welfare or character of the club. This alone would seem to vest so broad a discretion in the directors as would render a review by the courts inadvisable. On a similar question in the case of a commercial organization, a contrary result was reached very recently in Illinois. *Board of Trade* v. *Nelson*, 44 N. E. Rep. 743. It is submitted that the decision of the principal case is against the great weight of authority, to the effect that where the charter or rules provide a certain method of disfranchisement for specific causes, the assent of the member thereto being a fundamental condition of membership, the courts will not on mandamus examine into the merits of a decision of expulsion after the member has been regularly tried under such rules. High Ex. Rem., § 291; *Spilman* v. *Supreme Council*, 157 Mass. 128. The principal case is analogous to the very exceptional action of the New York court in issuing a writ of mandamus to compel the granting of a college degree. See 9 HARVARD LAW REVIEW, 536.

CORPORATIONS — NOTICE — IMPUTED KNOWLEDGE OF THE COMMON OFFICER OF TWO COMPANIES. — A company borrowed money of a society, but the meeting authorizing the borrowing was held irregularly. The secretary of the company was the secretary of the society and knew of this irregularity. *Held*, in proceedings for the winding up of the company, that the knowledge of the secretary could not be imputed to the society, and that the claim for the money lent could be proved at the winding up of the company. *In re Hampshire Land Co.*, [1896] 2 Ch. 743.

The court follow the case of *In re Marseilles Extension Co.*, L. R. 7 Ch. 161, laying down the rule that, unless the common officer had some duty imposed on him, either by the company of whose irregularity he had knowledge to give such notice, or by the company alleged to be affected by the notice to receive such notice, then his knowledge is not to be imputed. The case of *Gale* v. *Lewis*, 9 Q. B. 730, is distinguished on the latter ground. The line here drawn marks a clear and logical stopping place in this branch of the subject of imputed knowledge.

CORPORATIONS — RIGHTS OF MINORITY STOCKHOLDERS. — *Held*, that a foreclosure suit cannot be maintained at the request of a larger holder of bonds in a railroad corporation when that holder, also owner of a majority of the stock, procured a friendly board of directors to divert assets and refuse profitable traffic in order to create a default which would enable said holder to compel the trustee to foreclose, and so enable him to purchase at the sale. *Farmers' Loan & Trust Co.* v. *New York & N. Ry. Co.*, 44 N. E. Rep. 1043 (N. Y.). See NOTES.

CORPORATIONS — STOCK — DAMAGES FOR CONVERSION. — *Held*, that the measure of damages for the conversion of stock of a corporation is its value at the time of the conversion, with legal interest. *Mining Co.* v. *Bliley*, 46 Pac. Rep. 633 (Col.).

It is not disputed that the principal case is in accord with the weight of authority throughout the States, but, being *res nova* in Colorado, it may well be regretted that a more equitable rule was not laid down by the court. The fluctuating value of stock has led to a difference of opinion on this point. See Sedg. on Dam., 8th ed., 99–135. But the true and just measure of damages in these cases would seem to be the highest intermediate value of the stock between the time of conversion and a reasonable time after the owner has received notice of it, so as to enable him to replace the stock. *Galigher* v. *Jones*, 129 U. S. 193.

EQUITY — RELEASE — GENERAL TERMS. — Plaintiff was injured by defendant's negligence, and signed a release, general in its terms, but mentioning particular injuries which both parties supposed to be the only ones of consequence. Afterwards, on discovering a more serious injury which disabled him for life, he brought an action at law, and filed a bill in equity to limit the effect of the release, as pleaded by the defendant, to the particular injuries mentioned. On demurrer to the bill, it was held that a release, however general its terms, cannot apply to matters of which the parties had no knowledge at the time it was executed. 71 Fed. Rep. 21, reversed. *Lumley* v. *Wabash Ry. Co.*, 76 Fed. Rep. 66.

The ground of the decision is, that where a contract is so broad in its language as to cover matters of which the parties were ignorant, equity will confine its application to the real purposes of the bargain. The court cites *Farewell* v. *Coker*, 2 Mer. 353, in which the House of Lords held that, in determining whether a release passed a reversion in fee, it was a material issue whether the one signing the release knew that she had the reversion and intended to pass it. See also, to the same effect, *Ramsden* v. *Hylton*, 2 Ves. 304, 309, and *Lyall* v. *Edwards*, 6 H. & N. 337.

EVIDENCE — OPINION — MENTAL CONDITION. — *Held*, that one not an expert may testify as to a person's mental condition, on showing an acquaintance with him. *Kostelecky* v. *Scherhart*, 68 N. W. Rep. 591 (Iowa). A contrary decision was rendered in New Mexico, three judges dissenting. *Territory* v. *Padilla*, 46 Pac. Rep. 346.

When the element of judgment which accompanies every sensation is one on which reasonable men could not differ, the object of sensation is a fact. Where men might differ, the element of judgment is called in the law opinion, and it is desirable as far as possible to limit testimony to facts on which such opinion is based. The jury should draw all conclusions. Opinion enters into questions of mental condition, but it is difficult to present before a jury acts, gestures, and expressions from which insanity is to be inferred. Some courts, realizing that such testimony must often be so partial as to lead to an erroneous conclusion, hold with Iowa that the truth is more likely to be reached by receiving instead the opinion of the witness. The decision of the dissenting judges in the New Mexico case seems wiser, to require the witness to state all the facts possible, and then his own conclusion. The opinion may thus be compared with the facts, and the facts interpreted by the opinion. This is analogous to a witness's supplementary testimony in regard to character.

EVIDENCE — PROOF OF AGENCY IN CRIMINAL PROSECUTION. — In the prosecution of a police captain for extortion by threats made by an inferior officer, evidence to show that, in extortions from other persons the inferior officer was acting for the defendant, is inadmissible to show that in the extortion in question he was acting as defendant's agent. *People* v. *McLaughlin*, 44 N. E. Rep. 1017 (N. Y.).

It would seem that this evidence should have been admitted as bearing on notice. If the superior knew of his inferior's wrongful act, and did nothing about it, that is certainly a good basis for further inference. It was shown conclusively, that in former instances the inferior had been acting with his superior's knowledge and approval. Such evidence seems strongly in point to show knowledge in the present instance, and does not fall within any rule of exclusion.

EVIDENCE — RES JUDICATA. — Plaintiff and defendant had, in their individual capacities, litigated an issue upon a non-negotiable contract. On the trial of a subse-

quent suit between the same parties, plaintiff sued as the assignee of a right of a third party against defendant, arising upon a different chose in action, the assignment having been made after the breach of such second contract by defendant. *Held*, that a fact found to be true by the former adjudication is not *res judicata* in the latter suit. *Fuller* v. *Ins. Co.*, 35 Atl. Rep. 766 (Conn.).

The decision of the court seems sound. The assignee of a chose in action, being subject to the same defences as the assignor, may be regarded as the representative of the latter, and the first judgment *in personam* against the assignee individually could not have been taken advantage of as *res judicata* by the assignor, his principal, who was a stranger to it. *Petrie* v. *Nuttall*, 11 Exch. 569.

INJUNCTION — "PICKETING" BY STRIKERS. — Workmen kept a patrol in front of the shop of an employer with whom they had a dispute, to prevent other workmen from entering his employ. They had already been enjoined from using intimidation. *Held*, that their acts were not justified by their motive of getting better wages for themselves, and the picketing must be enjoined altogether. *Vegelahn* v. *Gunter*, 44 N. E. Rep. 1077 (Mass.). See NOTES.

INSURANCE — INSURABLE INTEREST IN A LIFE. — The appellant issued to the appellee a policy for $2,000 on the life of his mother, who was, at the time, seventy-six years old, and was being supported by the son. There was nothing in the appellee's complaint to show that he expected any pecuniary advantage, in the way of maintenance, service, or the like, from the continuance of the life of his mother. Neither the mother nor the son was under legal liability to support the other. *Held*, that the appellee had no insurable interest in the life of the assured. *People's Mut. Ben. Soc.* v. *Templeton*, 44 N. E. Rep. 809 (Ind.).

In England, although it is hard to reconcile some cases, it seems to be the law that a policy is supported by an interest derived from relationship alone in case the party obtaining the policy has a legal claim for support upon the assured. Bliss on Insurance, 16. It is said to be the established rule in the United States that the interest must be of a pecuniary nature, relationship alone not being sufficient. 7 Am. Dce. 42, note, where American authorities are reviewed. But see Bliss on Ins., 27-33. It has been held in England, in agreement with the principal case, that a son had no insurable interest in the life of his father, a pauper, dependent upon the son for support. *Schilling* v. *Ins. Co.*, 27 L. J. Exch. 16. See also *Life Ins. Co.* v. *Hogan*, 80 Ill. 35. In *Ins. Co.* v *Kane*, 81 Pa. St. 154, the court held, resting its decision in part upon relationship and in part upon the legal liability of the son to support the assured, that there was an insurable interest. This Pennsylvania decision seems wholly illogical, as legal liability on the part of the beneficiary to support the assured would naturally tend to negative insurable interest.

INSURANCE — REVOCATION OF POLICY. — Where the insurers had unwarrantably declared a life policy forfeited, *held*, that the assured might regard the contract rescinded, and recover from the insurers the paid premiums with interest. *Van Werden* v. *Equitable Life Ass. Soc.*, 68 N. W. Rep. 892 (Iowa).

It is difficult to see how there can be a rescission of the policy, for recissions require that the parties be placed in the position they held before the contract; Pollock on Contracts, 6th ed., 563; and the insurers have undergone a risk which cannot be repaired. But the policy is, of course, still good, and by a yearly tender of premiums a right of recovery may be retained for the executors of the assured. 2 Biddle on Insurance, § 1197. On the theory of anticipatory breach, however, an action might be had for damages now; and while the view taken by the court here is supported (*McKee* v. *Phœnix Co.*, 28 Mo. 383), it is more satisfactory to regard it as a question of damages. The amount of damages to be recovered would logically seem to be the difference between the amount the assured would have to pay in premiums for another policy of the same value and the amount he would have had to pay on the cancelled policy, both amounts to be computed with reference to the probable duration of life of the assured. *Barney* v. *Dudley*, 42 Kan. 212.

JUDGMENTS — EFFECT OF APPEAL. — *Held*, in *quo warranto* proceedings against a public officer, that a judgment of ouster divests such officer at once of all official authority, notwithstanding the fact that an appeal from this judgment is taken and an appeal bond filed, the effect of which, under the Washington code, is to "stay proceedings on the judgment." *Fawcett* v. *Superior Court of Pierce County*, 46 Pac. Rep. 389 (Wash.).

Such a decision as this may evidently lead to great irregularity in the administration of public affairs, but that it represents a well settled rule of procedure is apparent from the authorities cited in the opinion of the court. See especially *People* v. *Stevenson*, 57 N. W. Rep. 115; *State* v. *Woodson*, 31 S. W. Rep. 105; *Allen* v. *Robinson*, 17 Minn.

113. There seems to be a distinction between judgments which are self-executing and judgments which require for their execution the issuance of further process. In the former class, of which disbarment proceedings are an example, the taking of an appeal leaves the judgment unaffected; in the latter class, as, for instance, a judgment for damages, the taking of an appeal affects the judgment, for it stays the issuance of further process, without which the judgment is ineffectual.

PARTNERSHIP — INSOLVENCY — PROOF OF FIRM DEBTS. — X, a member of a partnership, becomes insolvent individually. The firm is solvent. *Held*, that, although in the distribution of assets individual creditors have preference over firm creditors, yet the latter may prove their claims and vote on the discharge of the insolvent. Knowlton, J., dissenting. *Clark* v. *Stanwood*, 44 N. E. Rep. 537 (Mass.).

Approaching this question from the mercantile point of view, and regarding the partnership as a legal entity, the decision could not be supported. For on that hypothesis the firm and the individuals composing it are two distinct legal persons, and the creditors of one have no right to proceed against the assets of the other. Taking the common law conception of a partnership, the weight of authority is probably with the leading case, though there is much conflict. *Barclay* v. *Phelps*, 4 Met. 397, and *Corey* v. *Perry*, 67 Me. 140, are leading cases for and against the decision of the majority. The result reached by the Court involved great hardship on the individual creditors. For they were outnumbered by the firm creditors, who voted to discharge the bankrupt, contrary to the wishes of the individual creditors. It seems that inasmuch as the partnership creditors were fully protected, as the firm was solvent, they should not have been allowed to affect the rights of other parties.

PARTNERSHIP — RIGHTS OF NON-RESIDENT PARTNER. — A partnership doing business in Massachusetts was composed of two citizens of Massachusetts and one citizen of New Hampshire. A resident of the former State, while indebted to the partnership, obtained his discharge in bankruptcy under the Laws of Massachusetts. *Held*, that the partnership claim was not barred by these bankruptcy proceedings. Field, C. J. and Allen and Holmes, JJ. dissenting. *Chase* v. *Henry*, 44 N. E. Rep. 988 (Mass.).

It is an undoubted proposition of law that a discharge in bankruptcy in one State does not bar actions by residents of other States on their personal claims against the debtor. The court in the principal case rest their decision on the above proposition, reasoning to the effect that, as the bankruptcy court had no jurisdiction over the partner who resided in New Hampshire, it had no jurisdiction over the partnership claim in which this non-resident partner was interested. It is submitted that this result does not follow from the rule, and that the conclusion of the judges who formed the minority is correct. It is clear that, after the debtor's discharge the Massachusetts partners lost their previous right of action. The New Hampshire partner could not bring any partnership action without joining his two associates as plaintiffs; but they, by the express decision of a competent court, have no standing in an action against the partnership debtor. How then can the New Hampshire partner enforce the partnership claim? An analogous case to the one under discussion is where the statute of limitations has run against one of several parties who are entitled to a joint action. In such cases, it is held that the action is barred. *Marsteller* v. *McLean*, 7 Cranch, 156; *Perry* v. *Jackson*, 4 T. R. 516.

PROPERTY — ADVERSE POSSESSION. — The plaintiff's boundary fence, encroaching on a highway, was maintained for over ten years. *Held*, that as the possession was with no claim of right, it was not adverse. *Rae* v. *Miller*, 68 N. W. Rep. 889 (Iowa).

The decision follows the anomalous law in Iowa that claim of right is a necessary part of adverse possession. *Grube* v. *Wells*, 34 Iowa, 148; *Donahue* v. *Lannan*, 70 Iowa, 73. That this position cannot be supported on principle is clear, inasmuch as the right of the person ousted is the same whether the one by whom he is ousted has a claim of right or not. In either case his right of action accrues at once, and the statute declares that one cannot sue after ten years has elapsed since his right accrued. The court relies on the case of *Slocumb* v. *R. R. Co.*, 57 Iowa, 675, which lays down a similar rule in regard to possession of land on the right of way of a railroad; but unless that case can be supported on the ground that the right of the company to the way did not accrue until it should have occasion to use it, the decision is equally indefensible. The principal case might, however, have been decided on the ground that the statute does not run against the State. *Philadelphia* v. *R. R. Co.*, 58 Pa. St. 253. Although this is the general doctrine it has not yet been so decided in Iowa, and the court do not mention it, preferring to rely on the questionable doctrine concerning adverse possession that has already been established in that State.

PROPERTY — COVENANT TO INSURE IN LEASE. — The lessee covenanted to insure the premises, and if they were destroyed by fire to apply the insurance to rebuilding, or pay it over to the lessor, at his option. *Held*, that the covenant ran with the land, and bound the assignee. *Northern Trust Co.* v. *Snyder*, 76 Fed. Rep. 34.

The case goes one step beyond that of *Vernon* v. *Smith*, 5 B. & Ald. 1, which holds that such a covenant to insure and rebuild runs with the land, in that in the principal case the lessor has the option of taking the money and not rebuilding. The court is clearly correct in its decision, for the alternative provision plainly concerns the use and occupation of the land. The more interesting question whether a covenant to insure only would run is left undecided, but the court intimates that, as a contract of insurance is a personal one of indemnity, therefore it probably would not run.

PROPERTY — DONATIO MORTIS CAUSA — DELIVERY ANTECEDENT TO GIFT. — *Held*, that an antecedent delivery with a different intent is sufficient to support a subsequent *donatio mortis causa*. *Cain* v. *Moon*, [1896] 2 Q. B. 283. See NOTES.

PROPERTY — RESCISSION OF SALE — COLLATERAL AGREEMENT. — The agent of a land company sold and conveyed a lot, agreeing without authority to sell no lots at a smaller price. On the company's selling lots to others for less, the vendee seeks to recover his purchase notes, offering to reconvey the land. *Held*, that as the company would not have obtained his purchase without the promise, they cannot take the benefits of the contract without the burdens, and the collateral agreement may be proved. *Rackemann* v. *River Bank Improvement Co.*, 44 N. E. Rep. 990 (Mass.).

The vendee accepted one entire offer from the agent (Pollock on Contracts, 6th ed., 38), and if that offer was unauthorized, it must be ratified or rejected in its entirety by the vendor, benefits and burdens alike. Mechem on Agency, § 775. The deed alone was not intended to cover the whole contract, for the collateral promise was a part of it, and so should be provable. Stephen Dig. Ev., art. 90. Then, as the whole contract cannot be enforced, and the parties can be placed in their former position, equity will rescind the contract and order the consideration repaid, the plaintiff reconveying the land. 2 Pomeroy, Equity, § 869.

PROPERTY — SUPPLEMENTARY PROCEEDINGS — EXEMPTIONS. — *Held*, the accrued wages of an employee of a city fire department cannot, on grounds of public policy, be got at by supplementary proceedings. *Sandwich Manuf. Co.* v. *Krake*, 68 N. W. Rep. 606 (Minn.).

A pension or salary given to an individual as compensation for a continuing public duty or service is held, on grounds of public policy, to be non-assignable. *Wells* v. *Foster*, 8 M. & W. 149; *Bliss* v. *Lawrence*, 58 N. Y. 442; *contra*, *State* v. *Hastings*, 15 Wis. 75. When, however, the salary, or part of it, has become due and payable, and the public official may get it on demand, it is difficult to perceive the grounds of public policy which forbid his assigning his right. "If the question had been whether or not the pay which was actually due might be assigned, I should have thought it like any other debt, assignable." Buller, J., in *Flarty* v. *Odlum*, 3 T. R. 681. If such right be assignable, it would seem that it might be reached in supplementary proceedings; but the opposite doctrine seems to be established in Minnesota. *Roeller* v. *Ames*, 22 N. W. Rep. 177.

PROPERTY — VESTING OF LEGACIES. — Bequest in trust for testator's wife for life, and after her death the principal to be divided among the testator's children when they reach twenty-one, or, if any die, to their issue; and the income on each one's presumptive share, in the mean while, or such part as the trustees should think fit, to be applied to his or her maintenance. Some of the children died without issue before reaching twenty-one. *Held*, that there was not enough to show the testator's intention to vest the legacies before twenty-one. *In re Wintle*, [1896] 2 Ch. 711.

The decision is important as declining to follow *Fox* v. *Fox*, L. R. 19 Eq. 286. There is an accepted rule of construction, that whatever be the wording by which the principal is given, a gift of the interest vests the principal at once. *Clobberie's Case*, 2 Ventr. 342. But where the interest is given as maintenance there is still some doubt. *In re Ashmore's Trusts*, L. R. 9 Eq. 99. Now in *Fox* v. *Fox* a right to apply part only of the income did not prevent the court from deciding that the whole interest was given with a discretion as to how much to apply, and so the principal vested. It would certainly seem that the same wording should not prevent the court in the principal case from concluding that the whole income was not intended to be given. Nevertheless, while rules of construction originate as interpretations of intention, they are often to be followed as rules of law; and the meaning of words is decided with reference to their similarity to construed words, rather than with regard to their meaning as bare vehicles of intention. But as *Fox* v. *Fox* was not an unquestioned decision, the court thought

they might well deny that it had settled the rule. It remains to see whether that or the present case will establish a construction.

PROPERTY — WILLS — EXECUTORY DEVISE. — A testator devised real estate to his two grandsons in fee simple as tenants in common, but provided that "if either of them should depart this life without leaving living issue, then in that case the survivor, or the heirs of his body, shall inherit all the property and estate devised to both of them." *Held*, first, that each grandson takes a fee simple with an executory devise over contingent on a definite failure of issue; second, that the contingency upon which the devise over depends need not occur during testator's lifetime, but is equally effectual whether it occurs before or after testator's death. *First National Bank* v. *De Pauw*, 75 Fed. Rep. 775.

This result seems correct. The court state that their decision is opposed to a rule of law commonly held in England and the United States. This so called rule, which the court profess to disregard, may be briefly stated as follows. Where real estate is devised in such terms that the primary devisee takes an estate in fee simple, subject to a devise over on a certain contingency, such contingency is to be referred and confined to the lifetime of the testator, and is ineffectual unless it occurs during that time. There seems to be no necessity for such a rule except in a case where the executory devise is contingent on the death of the devisee in fee. In *O'Mahoney* v. *Burdett*, L. R. 7 H. L. 388, Lord Hatherley said, "The period to which the executory devise will be referred will be the period of the death of the first taker, unless there are directions in the will inconsistent with that supposition." See to the same effect, and in accord with the principal case, *Button* v. *Thornton*, 112 U. S. 526.

SALES — WARRANTY — PAROL EVIDENCE. — *Held*, that evidence of a parol warranty made at the time of a written contract for the sale of chattels is not admissible in evidence unless the writing construed "according to the circumstances under which and the purposes for which it was executed" appears not to have been intended as a complete statement of the contract between the parties. *Wheaton Co.* v. *Noye Co.*, 68 N. W. 854 (Minn.).

The court follows *Thompson* v. *Libbey*, 34 Minn. 374, in repudiating the doctrine that a warranty is a collateral agreement relating to a different subject matter from the contract of sale, and hence admissible whether the writing completely covers the contract of sale or not. This latter doctrine was suggested in *Chapin* v. *Dobson*, 78 N. Y. 74. But it guards particularly against a possible interpretation of *Thompson* v. *Libbey*, as supporting the strict view of *Naumberg* v. *Young*, 44 N. J. Law, 331, that the incompleteness of the written contract must appear on the face of the writing itself. The case agrees with *Durkin* v. *Cobleigh*, 156 Mass. 108, and, while it avoids the extreme ground of *Chapin* v. *Dobson*, it allows the court to put itself in the position of the parties in construing their contract.

TRUSTS — CONSTRUCTIVE. — One Crane, the holder of certain county warrants, surrendered them to defendant county in exchange for its bonds. These bonds he sold to plaintiff; subsequently they were declared invalid. On demurrer to plaintiff's bill, *held*, plaintiff is entitled in equity to enforce Crane's claim for a restitution of the warrants. *Irvine* v. *Board of Com'rs*, 75 Fed. Rep. 765.

Had Crane never parted with the ownership of the bonds, his right in equity to compel a restitution would be clear: "If a county obtain the money of others without authority, the law, independent of any statute, will compel restitution or compensation." Field, J., in *Marsh* v. *Fulton County*, 10 Wall. 676, 684. In fairness, it would seem that the obligation of the defendant county should not be diminished by reason of the transfer, and that, in the particular case suggested, the transferee should be entitled, in equity, to the entire beneficial interest in his transferrer's right against the defendant county. On authority, this cannot be regarded as well settled. *Parkersburg* v. *Brown*, 106 U. S. 500; *Chapman* v. *Douglas County*, 107 U. S. 360; *contra*, *Ins. Co.* v. *Middleport*, 124 U. S. 534. Technically, even in the case suggested, the transferrer should be joined as party plaintiff or party defendant.

It is held that when a debt, secured by a mortgage, is assigned, the assignee is entitled to the benefit of the security, though ignorant of its existence when the debt was assigned. Jones on Mortgage, 5th ed., § 817.

TRUSTS — INSOLVENCY OF BANK OF DEPOSIT. — Plaintiff deposited checks in the defendant bank, which, knowing its insolvency, credited plaintiff with them and forwarded them to a correspondent. The latter credited the checks to the defendant as cash. *Held*, that plaintiff might recover as a preferred claimant the proceeds of such checks as had not been so credited to the defendant at the hour of failure, but had no preferred claim to those credited before. *Bruner* v. *Bank*, 37 S. W. Rep. 286 (Tenn.).

There had been no settlement between the defendant and the correspondent involv-

ing any of the checks in question, and it would seem that the defendant was entitled to recover the proceeds of all. The plaintiff's right is not founded upon the ground that the moment of failure fixes the status of all the parties concerned, as the court holds, but upon the fraud of the defendant in receiving the deposits with knowledge of its insolvency. *Craigie* v. *Hadley*, 99 N. Y. 131. Where the defendant has obtained title to personal property by fraud, and afterwards disposes of the property, a constructive trust arises as to the proceeds, in favor of the former owner, so long as the proceeds can be traced. *American Co.* v. *Fancher*, 145 N. Y. 552. In the principal case, the defendant held in trust its claim against the correspondent for the proceeds of all the checks.

An interesting recent case in this connection is that of *City Bank* v. *Blackmore*, 75 Fed. Rep. 771, where, a deposit of a draft having been received with knowledge of insolvency, and forwarded to a correspondent, the latter applied the draft to reduce the indebtedness of the insolvent bank of deposit to the correspondent. After some delay, the draft was paid to the correspondent upon the express request of the plaintiff, the depositor. It was there *held* that, although the depositor would have had a right to rescind the contract of deposit on the ground of fraud by the bank receiving it, yet, having authorized the payment to the correspondent, plaintiff was estopped from denying that the title of the correspondent to the draft was good as against himself and the bank of deposit; therefore, the only ground on which the plaintiff could recover would be that the insolvent bank had been thereby enriched after the failure to the amount of the draft; but although the debt of the insolvent bank had been reduced by the amount collected, it was benefited only to the extent of the dividends to which the correspondent would have been entitled as a general creditor, and this was the measure of plaintiff's recovery.

TRUSTS — MISAPPROPRIATION OF FUND — ACTION AT LAW. — Money was deposited in a bank by a mother to the credit of herself or her son, as trustee, for the purpose of her support and burial. The son drew it out, and appropriated it to his own use, without the mother's knowledge or consent. *Held*, that the beneficiary might sue at law to recover the definite sum misappropriated, as money had and received. *Henchey* v. *Henchey*, 44 N. E. Rep. 1075 (Mass.).

Apparently, the court go on the ground that, even supposing a trust to have been created here, and accepted by the trustee, an action at law could be maintained against the trustee because his misappropriation was of a definite sum of money. This cannot be supported on principle. The defendant had accepted the trust, and it was still open. The mere fact that the subject of the trust was a known sum of money is not material. Therefore, the doctrine of the principal case might well be extended to cases where land, the subject of a trust, is sold by the trustee in violation of the terms of the trust, and an action at law ought to be allowed for the value of the land. But the law is clear, that in such a case recourse must be had to equity. *Norton* v. *Ray*, 139 Mass. 230. See *Jasper* v. *Hagen*, 1 N. Dak. 75.

REVIEWS.

A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW. Part I. DEVELOPMENT OF TRIAL BY JURY. By James Bradley Thayer. Boston: Little, Brown, & Co. 1896. pp. x, 186.

These one hundred and eighty pages are only a portion of the first volume of Professor Thayer's expected treatise on the Law of Evidence. This portion may well stand by itself, however, as an important contribution to legal learning. Just how important, can probably be fully appreciated only by one already learned in the subject. At the first reading, indeed, the novice will hardly realize how many vexed and obscure points of legal antiquities are here elucidated, simply because he will, if he have a real interest in the history of English law, find it such delightfully easy reading. Every serious historical scholar nowadays tries to get at the original sources, and cite them in his book. Unfortunately, however, very few of them have the art of making the original authorities tell their